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NTSB Order No. EA-3832

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of March, 1993

_____)	
JOSEPH DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11047
v.)	
)	
MICHAEL EARL HANEY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on October 17, 1990, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent violated 14 C.F.R. 121.315(c) and 91.9.² The law

¹The initial decision, an excerpt from the hearing transcript, is attached.

²§ 121.315, Cockpit check procedure, as pertinent, provides:
6004

judge, however, reduced the proposed suspension of respondent's airline transport pilot certificate from 15 to 10 days.³ We deny the appeal.

Respondent was first officer on America West Airlines' Flight 256, departing Phoenix, AZ on October 6, 1989. Following takeoff, the crew was unable to retract the Boeing 737's nose gear. The aircraft was returned to Phoenix, where the crew made an uneventful landing. Upon inspection, it was found that the nose gear's downlock safety pin was still in position.

The Administrator argued, and the law judge found, that § 121.315(c) had been violated through respondent's failure to complete the checklist for the aircraft. Specifically, that checklist provided:

Ground Locking PinCHECK
Remove nose gear downlock safety pin.

See Exhibit C-3, page 4. The law judge rejected arguments that respondent's failure should be excused because: 1) maintenance
(..continued)

(a) Each certificate holder shall provide an approved cockpit check procedure for each type of aircraft.

(c) The approved procedures must be readily usable in the cockpit of each aircraft and **the flight crew shall follow them when operating the aircraft.**

(Emphasis added.)

§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator has not appealed this reduction in sanction.

personnel had the duty to note in the aircraft log that nose gear pins had been inserted and removed and the duty to remove the nose gear pin, yet had failed to do either; 2) the nose gear pin did not have the red streamer that would have allowed easy notice; and 3) the cockpit check had indicated the presence of three pins (with streamers), thus further leading the crew to believe that all pins were accounted for. The law judge noted, among other things, that maintenance crew failures were a separate matter that did not excuse respondent's omission. The law judge further found that § 91.9 had also been violated by the additional in-flight drag created by the nose gear.

On appeal, respondent reiterates many of the arguments made at the hearing. We agree with most of the law judge's analysis, however. The checklist clearly set forth respondent's duty. He was to check for and remove any nose gear pin.⁴ That maintenance personnel also failed in their duties illustrates the importance of respondent's function; it does not excuse his conduct.⁵ It is also clear from the record that the presence of a nose gear pin could be determined without a red streamer. Tr. at 63. As the law judge found, respondent's expectation of a streamer, as well

⁴We, thus, reject respondent's argument, unsupported by the evidence, that his job was only to check whether a pin with a streamer was visible, and did not include taking any action if he found a nose pin.

⁵Respondent does not argue he reasonably relied on maintenance's proper performance of their duties and, in the facts of this case, dismissal based on this defense would not be available. See Administrator v. Fay and Takacs, NTSB Order EA-3501 (1992); Administrator v. Louthan, 3 NTSB 928 (1978); and Administrator v. Dickman and Corrons, 3 NTSB 2252 (1980).

as proper performance by ground crew of assigned duties, are matters that may be taken into account in assessing sanction.

Respondent also argues, citing Essery v. Department of Transportation, 857 F.2d 1286 (9th Cir. 1988), and Administrator v. Reynolds, 4 NTSB 240 (1982), that the § 91.9 violation cannot stand because the Administrator failed to prove either that the likelihood of potential harm was unacceptably high or that the pilot's exercise of judgment was clearly deficient. Respondent points out that the landing was uneventful and argues that the failure to remove the nose gear pin had no effect on safety.

In reply, the Administrator notes the record evidence regarding drag and suggests that Reynolds, which involved helicopter operations, does not apply to fixed wing aircraft. Instead, the Administrator argues, all he is required to show here is potential endangerment.

We agree that Reynolds applies only to helicopter operations. Administrator v. Erickson and Nehez, NTSB Order EA-xxxx (1993). As to fixed wing aircraft, a violation of an operational regulation is sufficient to support a finding of a "residual" or "derivative" section 91.9 violation. See, e.g., Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there; and Administrator v. Thompson, NTSB Order EA-3247 (1991) at footnote 7.⁶ Section 121.315 is such an operational violation and, therefore, it was unnecessary for the

⁶As a residual, or derivative violation, the § 91.9 finding has no effect on sanction.

law judge specifically to find potential endangerment had been proven on the record.

Furthermore, we see no merit in respondent's argument that the § 91.9 complaint should be dismissed because the Administrator is not following the policy he established in Compliance/Enforcement Bulletin 90-9. That bulletin directs that reports recommending § 91.9 prosecution contain specific details to support the charge and the potential or actual danger involved. There is no indication that this procedure was not followed. The bulletin contains no sanction or enforcement direction that would be relevant in this case.

Finally, respondent suggests that the 10-day suspension ordered by the law judge is too severe, as there was no safety risk. The cases cited by respondent, however, are not on point, and a 10-day suspension is within the range of sanction applied in the past. Moreover, even though potential endangerment need not be proven, we note that there is a hazard to safety here that is implicit in respondent's failure properly to perform the required preflight check.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 10-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).